

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF MONTANA**  
**BILLINGS DIVISION**

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WALTER M. STEWART, JR.,

Plaintiff,

vs.

CARLOS JONES, MICHELLE PHILLIPS  
LORI BRYON, ROBERT BYRON, SAFARA  
BIGLAKE, and JACINTA STEWART,

Defendants.

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CAUSE NO. CV 07-108-BLG-RFC-CSO

ORDER GRANTING IN FORMA PAUPERIS  
STATUS AND FINDINGS AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE  
JUDGE TO DISMISS COMPLAINT

This matter is currently before the Court on Plaintiff's Motion for Leave to Proceed *In Forma Pauperis* (Court's Doc. No. 1) and proposed civil complaint regarding a federal criminal conviction in 1995. (Court's Doc. No. 2).

**I. MOTION TO PROCEED IN FORMA PAUPERIS**

Plaintiff filed his motion to proceed *in forma pauperis* on July 30, 2007. Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Because it appears Plaintiff lacks sufficient funds to prosecute this action, his Motion to Proceed *In Forma*

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*Pauperis* will be granted. Plaintiff's Complaint shall be deemed filed as of the date that the Motion to Proceed *In Forma Pauperis* was filed and the proposed complaint was delivered to the Clerk of Court. *See Loya v. Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 280-81 (9th Cir. 1983); *see also United States v. Dae Rim Fishery Co.*, 794 F.2d 1392, 1395 (9th Cir. 1986) (concluding complaint constructively filed when delivered to clerk of court).<sup>1</sup>

## **II. PRELIMINARY SCREENING STANDARDS**

The court has permitted Plaintiff to proceed in forma pauperis. As such, his complaint is subject to screening under 28 U.S.C. § 1915, which imposes a screening responsibility on the district court. Section 1915(e)(2) reads in pertinent part as follows:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that— (A) the allegation of poverty is untrue; or (B) the action or appeal— (i) is frivolous or

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<sup>1</sup>Case law from courts in the First, Second, Third, Fifth, Seventh, Tenth, and District of Columbia circuits supports this position. *See Shabazz v. Cole*, 69 F.Supp.2d 177, 191 (D.Mass.1999) (“For statute of limitations purposes, a complaint in an action where leave to proceed in forma pauperis is requested is generally deemed to have been filed on the day the motion is received by the Clerk of the Court.”); *Rosenberg v. Martin*, 478 F.2d 520, 522 n. 1a (2nd Cir. 1973) (holding that the “action must be treated as commenced ... when the Clerk of Court received the complaint” in a case in which the plaintiff filed both the complaint and an IFP application, but the IFP application was not granted until 35 days later and complaint was then “formally filed”); *McDowell v. Del. State Police*, 88 F.3d 188, 191 (3rd Cir. 1996) (“Although a complaint is not formally filed until the filing fee is paid, we deem a complaint to be constructively filed as of the date that the clerk received the complaint-as long as the plaintiff ultimately pays the filing fee or the district court grants the plaintiff's request to proceed in forma pauperis.”); *Ynclan v. Dep't of Air Force*, 943 F.2d 1388, 1392 (5th Cir. 1991) (“This court has held ... that a delay by the clerk in stamping a complaint ‘filed’ due to the pendency of a motion to proceed IFP does not jeopardize the timeliness of the plaintiff's commencement of suit.”); *Smith-Bey v. Hosp. Adm'r*, 841 F.2d 751, 757 n. 5 (7th Cir. 1988) (“[T]he generally accepted rule [is] that a complaint is deemed ‘filed’ within the meaning of Fed.R.Civ.P. 3 for purposes of invoking the court's jurisdiction over an action when it is placed in the custody of the district court clerk.”); *Jarrett v. U.S. Sprint Commc'ns Co.*, 22 F.3d 256, 259 (10th Cir. 1994) (“Plainly, the statute of limitation is tolled while the IFP petition is pending.”).

malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2). Thus, this section provides that the Court may dismiss the complaint before it is served upon the defendants if it finds that the complaint is “frivolous” or that it “fails to state a claim upon which relief may be granted.”

A complaint is frivolous if it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 1831-32, 104 L.Ed.2d 338 (1989). A complaint fails to state a claim upon which relief may be granted if a plaintiff fails to allege the “grounds” of his “entitlement to relief.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. \_\_\_\_, 127 S.Ct. 1955, 1964-65 (May 21, 2007) (quotation omitted). This requirement demands “more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action.” *Id.* A complaint must “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (quoting *Bell*, 127 S.Ct. at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957))).

Additionally, “[a] document filed pro se is ‘to be liberally construed,’ and ‘a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Erickson*, 127 S.Ct. at 2200; *Cf.* Fed. Rule Civ. Proc. 8(f) (“All pleadings shall be so construed as to do substantial justice”).

### **III. PARTIES**

Plaintiff is proceeding *pro se* and *in forma pauperis*.

The named Defendants are Carlos Jones, Chief United States Probation Officer in

Billings, Montana; Michelle Phillips, Sex-Therapist in Billings/Hardin, Montana; Lori Byron, Medical Doctor, Crow/Cheyenne Hospital, Crow Agency; Robert Byron, Medical Doctor, Crow/Cheyenne Hospital Crow Agency, Montana; Safara Biglake, B.I.A., Billings, Montana.

#### **IV. PLAINTIFF'S ALLEGATIONS**

Plaintiff alleges that in 1995 he was charged under 18 U.S.C. § 1152 in Cause No. CR-95-23-BLG-JDS. He contends that before going to trial in that matter there was evidence that Plaintiff was not involved in the crime and that his D.N.A. would prove this. He submits that all the named Defendants could have proven that he did not commit this crime.

He has now apparently been released from federal custody as indicated in his Notice of Change of Address dated August 2, 2007. (*Court's Doc. No. 4*). Although the Court could require Plaintiff to submit an updated motion, in light of the ruling below, it will not do so.

#### **V. ANALYSIS**

In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the United States Supreme Court held that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,” or otherwise declared invalid, called into question by the issuance of a habeas writ, or expunged. *See Martin v. Sias*, 88 F.3d 774, 775 (9th Cir.1996) (applying *Heck* to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) actions). Plaintiff has failed to allege or show that his conviction has been reversed, declared invalid, expunged, or called into question. Thus, his claim is premature and he has failed to state a claim upon which relief may be granted.

Therefore, the Court should dismiss this case.

Based upon the foregoing, the Court makes the following:

**ORDER**

1. Plaintiff's Motion for Leave to Proceed *in forma pauperis* (Court's Doc. No. 1) is **GRANTED**. The Clerk of Court shall waive prepayment of the filing fee.
2. The Clerk shall edit the text of the docket entry for the Complaint to remove the word "LODGED" and the Complaint is **DEEMED FILED** on July 30, 2007.

Further, the Court makes the following:

**RECOMMENDATION**

1. Plaintiff's Complaint (Court's Doc. No. 2) should be **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief can be granted.
2. Pursuant to Fed. R. App. P. 24(a)(4), the district court should **CERTIFY** that any appeal by Plaintiff from this disposition would be taken in bad faith.
3. The Clerk of Court should be directed to have the docket reflect that this dismissal counts as a strike with regard to the Prison Litigation Reform Act, 28 U.S.C. § 1915(g).

**NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND  
CONSEQUENCES OF FAILURE TO OBJECT**

Pursuant to 28 U.S.C. § 636(b)(1), Plaintiff may serve and file written objections to this Findings and Recommendations within ten (10) business days of the date entered as indicated on the Notice of Electronic Filing. A district judge will make a *de novo* determination of those

portions of the Findings and Recommendations to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendations. Failure to timely file written objections may bar a de novo determination by the district judge.

**PLAINTIFF IS CAUTIONED TO KEEP THE COURT ADVISED OF ANY  
CHANGE OF ADDRESS. A FAILURE TO DO SO COULD RESULT IN THE  
DISMISSAL OF THIS CASE WITHOUT FURTHER NOTICE TO PLAINTIFF.**

DATED this 14th day of August, 2007.

/s/ Carolyn S. Ostby  
Carolyn S. Ostby  
United States Magistrate Judge